APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO
1973 TERM

To wit: September 6, 1973

No. 72-697

THE STATE OF OHIO, CITY OF COLUMBUS.
CITY OF CINCINNATI, *Appellee,*

vs.

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Appellants*; ET AL., *Appellee.*

SYLLABUS OF COURT

1. A trial court may permit a taxpayer and a citizen of a municipal corporation to intervene in a contempt action brought by the municipality against a union of city employees, where the court properly determines that such intervention is in the public interest or in furtherance of justice.

2. Notice which apprises the defendant of the nature of the charge against him so that he may prepare a defense is sufficient to comply with the requirements of R.C. 2705.03.

3. In a contempt proceeding, damages may properly be awarded to a municipal corporation as compensation for losses sustained as a result of the violation of an injunction against striking by a union of municipal employees.

4. Reduction in payroll expense of a municipal corporation, occasioned by a strike of municipal employees, may not be offset against damages sustained by the municipal corporation as the result of the strike.

Appellants, Cincinnati District Council 51, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter Council 51), and the American Fed-

eration of State, County, and Municipal Employees, AFL-CIO (hereinafter the International), were found in contempt of the Hamilton County Common Pleas Court for violation of a permanent injunction against striking and/or picketing against the city of Cincinnati, issued by that court on January 6, 1970. The strike was found by the Common Pleas Court to have lasted from January 4, 1970, through February 9, 1970. On September 14, 1971, the Common Pleas Court entered judgment finding appellants in contempt of court and fining them $37,000, $1,000 for each day of the strike. After crediting against this fine $7,800 (forfeiture of a security bond), $2,400 (fines previously paid by individuals), and $1,000 (court costs), the balance of the fine was determined to be $25,800. Of this $25,800 balance $13,000 was awarded to the city of Cincinnati as damages, and the remainder was awarded to Hamilton County as a "criminal penalty."

Further facts as necessary to the decision of this case are discussed in the opinion.

The Court of Appeals affirmed the judgment of the trial court. The cause is before this court pursuant to the allowance of a motion to certify the record.

O'NEILL, Chief Justice:—This appeal raises serious and difficult questions regarding the powers of courts to punish for contempt of their orders.

It is noted at the outset that both a temporary restraining order issued on January 4, 1970, and the permanent injunction issued on January 6, 1970, enjoined Council 51 ". . . from carrying on a strike and/or picketing against the city of Cincinnati, Ohio." It is not here contended that the injunction was unlawfully issued, and it is conceded that by striking Council 51 acted in contempt of the injunction. Appellants, however, assert ten propositions of law, in essence challenging the nature and extent of punishment of Council 51 and the International, and the intervention by the intervenor-defendant, appellee herein.

In particular, appellants assert:

(1) That they were denied due process of law by not being put on notice "at any time prior to judgment" that they were being tried for multiple contempts;

(2) That the denial of a motion for specification of the charges is an abuse of discretion in light of the finding of multiple contempts;

(3) That a judgment finding appellants in contempt of the permanent injunction on January 4 and 5 is unsupportable on its face;

(4) That the judgment is without the requisite evidentiary support;

(5) That the court's authority to punish for indirect contempt is limited by R. C. 2705.05 and 2727.12, which sections do not authorize an award of damages;

(6) That since a jury trial may not be had in a contempt proceeding, the awarding of a damage judgment in such a proceeding deprives the appellants of the right to a jury trial in an action for damages in violation of Section 5 of Article I of the Ohio Constitution;

(7) That it is error to permit a person to intervene pursuant to R. C. 733,581 for the purpose of initiating new contempt proceedings where an injunction action instituted by a municipal corporation has been concluded by the entry of final judgment;

(8) That it is improper to assess a fine of $1,000 for each contempt, since R. C. 2705.05 provides for a maximum fine of $500;

(9) That agreement by the city to waive its right to have acts in violation of the injunction adjudged to be in contempt constitutes a defense to a subsequent charge of contempt;

(10) That the proper measure of damages is the actual monetary loss sustained and that since the city reaped a monetary gain, the judgment awarding damages can not stand.

Propositions (1) and (2) relate to the question of whether appellants were adequately notified of the nature of the proceedings against them and will be treated together. Propositions (3) and (4) question the degree of evidence necessary to support the judgment below and will be treated together. Propositions (5), (6), (8) and (10) relating to the award of damages and the size of the fine, will also be treated together. The remaining propositions will be treated separately.

I. Proposition of law (7).

R. C. 733.581 provides in pertinent part:

> "In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be furthered."

That statute has not been previously construed by this court. It is apparent, however, that the granting or withholding of permission to intervene is within the sound discretion of the trial court.

Unless the trial court is shown to have abused that discretion, this court will not disturb its decision.

The record indicates that the application to intervene was filed on February 6, 1970, subsequent to declarations by the officers of the city expressing an intention to dismiss the contempt proceedings arising from violations of the permanent injunction. The trial court conducted a hearing on the application to intervene, during which counsel for the city protested the intervention and expressed the city government's desire to terminate the proceedings. They argued, in essence, that it was the responsibility of the public officials to determine what course of action was in the best public interest, and that "* * * at best, Mr. Goldberg is here to question the handling of this case by a solicitor."

That argument, which challenges the standing of a taxpayer to question discretionary decisions of government officials by intervention in litigation, is relied upon by appellants in this court. The appellee argued that the government's position failed to protect the interests of the people of Cincinnati. He contended that to permit the contempt of appellants to go unpunished would encourage disrespect for orders of the courts. Further, he contended that the city had suffered substantial damage as a result of the strike, which would not be recompensed should the contempt proceeding be dismissed.

The argument of counsel for the city clearly fails to meet the contentions raised by the appellee. While it may be conceded that municipal officials are invested with broad discretion to decide matters of public interest, this discretion is not entirely unchecked. The General Assembly has seen fit to provide certain procedures through which taxpayers of a municipality may question the government's decisions in matters of public interest. One of these procedures is provided in R. C. 733.581, which permits taxpayers to present their views on public questions to the courts in actions in which the municipality is a party.

It is difficult to conjure matters of greater public interest than the preservation of city services or the maintenance of respect for the lawful orders of the courts. Where litigation touches both matters, it is not an abuse of discretion to permit intervention by a taxpayer.

II. Propositions of law (1) and (2).

Appellants argue that they were denied due process of law in that they were not notified that the proceeding against them involved multiple contempts. In this connection, appellants further complain that "* * * the denial of a motion for specification of the charges is an abuse of discretion * * *."

Proceedings in contempt are *sui generis* in the law. They bear some resemblance to suits in equity, to criminal proceedings and to ordinary civil actions; but they are none of these. Contempt proceedings are means through which the courts enforce their lawful orders. The power to punish for contempt is said to be inherent in the courts and to exist independently from express constitutional provision or legislative enactment. See State v. Local Union 5760 (1961), 172 Ohio St. 75, 173 N.E.2d 331, 47 LRRM 2921. The nature of contempt proceedings can vary greatly. Some are summary; others involve notice and hearings. Generally, there is no jury trial; but where a long term of imprisonment is involved a jury trial may be a requisite.

What constitutes due process in a contempt proceeding depends to a large extent upon whether the contempt is direct or indirect, and whether it is civil or criminal. The distinction between these alternatives is far from clear. It is said that direct contempt takes place in the presence of the court, and indirect contempt is all other contempt. Yet, in Local Union 5760, supra, this court held that "interference with a court officer in his attempt to execute court process constitutes direct contempt in the constructive presence of the court," and that "courts, in their sound discretion, have the power to determine the kind and character of conduct which constitutes direct contempt of court." The court arrived at this holding despite a statute which provided that "Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment or command of a court or an officer" was indirect contempt.

The distinction between direct and indirect contempt is important. Both procedural and substantive rights are affected. Direct contempt is generally dealt with summarily, whereas it has been stated that statutory procedures must be followed in indirect contempt proceedings. See State v. Local Union 5760, supra; In the Matter of Lands (1946), 146 Ohio St. 589, 67 N.E.2d 433.

The present appeal involves the type of proceeding traditionally viewed as indirect contempt. The contempt took place out of the presence of the court. Furthermore, there was no interference with an officer of the court in his attempt to execute court process, viz., there was no direct contempt in the constructive presence of the court.

R. C. 2705.03 sets forth the procedure which must be followed in indirect contempt proceedings. That section, *inter alia*, provides that "a charge in writing shall be filed with the clerk of court." Appellants do not deny that a charge was filed, but they contend that neither the show cause order nor the affidavit in support thereof apprised them that multiple contempts were charged and that they were thereby denied due process of law.

The function of written notice is to apprise the defendant of the charges against him so that he is able to prepare his defense. See Foutty v. Maxwell (1962), 174 Ohio St. 35, 186 N.E.2d 623. The show cause order here involved apprised the appellants of both the nature of the proceeding (civil contempt) and the reason for the proceeding (violation of the permanent injunction previously entered). That the order did not mention that 37 contempts would be punished did not work prejudice against the appellant union. Each of these separate contempts was the same as the others, i.e., that the appellants conducted a strike in violation of the permanent injunction. Furthermore, appellants were certainly aware of the number of days they remained on strike.

Appellants strenuously assert that they were prejudiced by lack of notice. Nowhere, however, do they indicate the precise nature of this prejudice. The most that appellants assert is that "appellants, not having been advised that they were charged with thirty-seven separate contempts, made no effort to defend against such a charge." This

argument is sound so far as it goes, but it does not go far enough. No evidence was introduced or argument advanced to show how appellants would have defended differently had they been fully aware that 37 contempts were involved. Although appellants argue that prejudice could have arisen, they totally fail to demonstrate that prejudice actually arose in this case.

The motion which appellants here label "a motion for specification" was properly overruled for these same reasons. The motion was first made orally at the commencement of trial: "Move to dismiss on the ground that the affidavit of the motion for order to show cause and the order to show cause itself does not apprise the parties affected with any information as to the act which they are alleged to have committed which is said to be in contempt of the court's permanent injunction in this case." As noted previously, the show cause order advised the appellants that they were charged with violation of a permanent injunction which enjoined appellants "* * * from carrying on a strike and/or picketing against the city of Cincinnati." Such notice was clearly sufficient to apprise the appellants of the charge against them and to enable them to prepare a defense.

III. Propositions of law (3) and (4).

Appellants argue that the judgment of the trial court finding them in contempt on January 4 and 5 was erroneous on its face, since the permanent injunction was not issued until January 6, 1970. They contend further that the entire judgment of the trial court lacks the requisite evidentiary support.

Since the show cause order spoke only of the "permanent injunction" and the "permanent injunction" was not issued until January 6, 1970, it was improper to fine appellants for acts occurring on January 4 and 5 of 1970. That a temporary restraining order had been issued on January 4, 1970,

does not change this result as violation of that restraining order was not alleged in the show cause order. Furthermore, the record reveals that appeallant Council 51 had already been fined for violation of the temporary restraining order in a proceeding on January 7, 1970, thus rendering that issue *res judicata* as to Council 51.

Appellants' argument that the trial court's judgment lacked requisite evidentiary support is directed primarily to the finding against the appellant International. Indeed, counsel for the appellants admits in its brief to this court that "There is no question but that Council 51 supported the strike from beginning to end."

Appellants stress that the judgment herein must be supported by "clear, positive, and convincing" evidence, citing Loney v. Hall (1917), 8 Ohio App. 154. However, that case also proposed that "The judgment of a trial judge who has passed upon the sufficiency and weight of the evidence will not be disturbed, where the evidence is such that different minds might reach different conclusions." Furthermore, it is well settled that this court does not weigh evidence. E.g., State v. Wilson (1972), 30 Ohio St.2d 199, 283, N.E.2d 632. This court, however, will examine the record to determine whether the requisite degree of proof has been met. Cincinnati Motor Transp. Assn. v. Lincoln Hts. (1971), 25 Ohio St.2d 203, 206, 267 N.E.2d 797.

Although this court is not bound by Loney, the degree of proof required by that case has been met herein with respect to the judgment against the International. The record reveals that the president of the International was notified within 24 hours after the strike was called. Thereafter, the International sent three representatives to Cincinnati. These representatives attended meetings with city representatives, wherein the city was advised that "the men would not return to work until an agreement satis-

factory to the Unions had been reached." The director of Council 51 testified that he contacted the International "from time to time" as the strike was continuing, and that the president of the International advised him that money would be sent to the strikers. It was also testified that the International did, in fact, send some $20,000 to Council 51 for "hardship cases." Testimony of a newspaper reporter present at many of the union meetings revealed that at least one of the International representatives made public statements in support of the strike, and that "every union leader I heard speak to a large body of people, publicly supported the strike."

From the foregoing testimony and from the record as a whole, a majority of this court is of the view that the trial court correctly found that the International aided and encouraged the strike in violation of the permanent injunction.

IV. Propositions of law (5), (6), (8) and (10).

Appellants contend that the award of damages herein was unlawful and unconstitutional. They also contend that since the measure of damages is actual monetary loss and that since the city saved a substantial sum in payroll, the city suffered no actual monetary loss.

The constitutional objection to the award of damages arises under Section 5 of Article I of the Ohio Constitution, which provides:

> "The right to trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

Appellants argue that "since a jury trial may not be had in a contempt proceedings, the awarding of a damage judgment in such a proceeding deprives the defendant of his right to a jury trial in an action for damages in violation of Article I, Sec. 5 of the Ohio Constitution."

That argument is untenable. It is well settled that "* * * conduct can amount to both civil and criminal contempt," United States v. United Mine Workers of America, (1947), 330 U.S. 258, 299, 19 LRRM 2346, 2361, and that both aspects may be dealt with in the same proceeding. See, also, Cromaglass Corp. v. Ferm (M.D. Pa. 1972), 174 U.S.P.Q. 469, 344 F.Supp. 924. It is also well settled that "judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, *and to compensate the complainant for losses sustained*" United Mine Workers, *supra, at 303,* 19 LRRM at 2363. See, also, N.L.R.B. v. San Francisco Typographical Union (C.A. 9, 1972), 465 F.2d 53, 80 LRRM 3076; Windham Bank v. Tomaszczyk (1971), 27 Ohio St.2d 55, 271 N.E.2d 815; and Dept. of Pub. Health v. Cumberland Cattle Co., 72 Mass. 1031 (1972), 282 N.E.2d 895.

The present case involves both civil and criminal aspects. The award of damages to the city of Cincinnati is the civil aspect, and such award is proper in a contempt proceeding to compensate for losses. Furthermore, it is clear that Section 5 of Article I "* * * only guarantees the right of trial by jury in those cases where it existed previous to its adoption." Belding v. State, ex. rel. Heifner (1929), 121 Ohio St. 393, 169 N.E. 301. There exists no right to trial by jury in contempt proceedings, except perhaps where lengthy jail sentences are likely. Such is not the case here.

Appellants assert that the award of damages was unlawful as exceeding the court's authority to punish for contempt under R. C. 2705.05 and R. C. 2727.12. Similarly, they contend that it was improper to assess a fine of $1,000 for each contempt since the maximum fine allowed under R. C. 2705.05 is $500.

Assuming, *arguendo*, that the General Assembly may limit the power of the courts to punish for contempt of their lawful orders, it is apparent that the fines in the present case are within the limits of R. C. 2705.05. The $500 maximum fine under that statute applies to a single contempt by a single contemner. Here there are two contemners, Council 51 and the International; thus, a $1,000 fine against both for each day of the strike would be within the statutory limit.* It is, however, highly doubtful that the General Assembly may properly limit the power of a court to punish for contempt. Although it is conceded that the General Assembly may prescribe procedure in indirect contempt cases, the power to punish for contempt has traditionally been regarded as inherent in the courts and not subject to legislative control. See State v. Local Union 5760, supra (172 Ohio St. 75, 47 LRRM 2921). The Courts of Common Pleas are established by Section 1 of Article IV of the Ohio Constitution not by the General Assembly, and, hence, are coequal branches of the government. Those courts are vested with the judicial power of the state, which includes the power to enforce orders by contempt proceedings.

Respecting the award of a portion of their fines assessed herein as damages to the city of Cincinnati, appellants argue that R. C. 2727.12 speaks only of "restitution" to the injured party, and that damages are not restitution. While at common law restitution denoted return of a specific thing or condition, modern usage of that term includes restoration to its rightful owner and also compensation for

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* It is well settled that separate fines may be assessed for each day in which a court's order is violated. New Jersey v. New York (1933), 290 U.S. 237; Madden v. Grain Elevator, Flour & Feed Mill Wkrs. (C.A. 7, 1964), 334 F.2d 1014, 56 LRRM 2728. Meredith v. Fair (C.A. 5, 1962), 313 F.2d 532; Meredith v. Fair (C.A. 5, 1962), 313 F.2d 534; Commonwealth v. Hudson (1943), 315 Mass. 335, 52 N.E.2d 566.

loss or injury caused to another. 66 American Jurisprudence 2d 942, Restitution and Implied Contracts, Section 1. In any event, as previously discussed, compensation of the injured party has traditionally been a function of civil contempt proceedings. It was, therefore, proper for the trial court to award damages to the city of Cincinnati to compensate for losses sustained during the strike.

Appellants contend that the city sustained no loss as a result of the strike, for the reason that it saved substantial sums in payroll expenses. This argument is wholly untenable. Obviously, the city sustained a substantial loss of vital services as a result of the strike. Streets were left unrepaired, garbage remained uncollected and sewage was untreated. Millions of gallons of raw sewage were poured into the Ohio River. Although the precise cost of this loss of services can never be accurately determined, the injury occasioned thereby was no doubt substantial.

In any event, the record reveals that the excess cost of using supervisory personnel to operate the waterworks was $63,000, not including fees of $20,000 paid to outside contractors who provided services normally performed by city employees. This alone is sufficient to justify the award of $13,000 in compensation to the city.

V. Proposition of law (9).

Finally, appellants argue that by agreement or by conduct the city officials waived their right to prosecute for contempt and that such waiver operates as a defense to this proceeding.

The Court of Appeals found that this argument is not supported by the record. Assuming, *arguendo*, that it is so supported, however, adoption of appellants' view would nullify R. C. 733.581. That statute, as previously discussed, operates as a check upon the discretion of city officials when matters of public interest are in litigation. This check

would be a farce should the conduct of city officials be held a defense to actions involving questions of public interest.

In support of their argument, appellants quote from 17 Corpus Juris Secundum, 103, Contempt, Section 39, that:

> "As a rule, the fact that the contempt charged is the result of the direct or implied advice or consent of complainant is a sufficient justification therefor * * *."

Appellants, however, have not quoted far enough. That section continues:

> "* * * although it has been held that an arrangement between the parties or their attorneys is not an excuse for disobedience of a court order. It has been further held that complainant's consent to the violation of a court order must be of a decided character to be effective."

Tested by those principles, it is apparent that the actions of the city officials or any agreement made by them does not operate as a defense to the present action.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed in all respects, except that it is reversed with respect to the finding that appellants were in contempt of the permanent injunction on January 4 and January 5, 1970.

Judgment affirmed in part and reversed in part.

HERBERT, STERN, and PAUL W. BROWN, Justices, concur.

CORRIGAN and CELEBREZZE, Justices, dissent.

WILLIAM B. BROWN, Justice, concurs in paragraphs one and two of the syllabus but dissents from paragraphs three and four of the syllabus and from the judgment.

DISSENTING OPINIONS

CORRIGAN, Justice, dissenting:—As the majority suggest in their opinion, this appeal raises serious questions. They further point to difficult questions. They fail to find simple answers to at least one of the difficulties that seems to be troublesome to them.

R. C. 733.581 provides, in pertinent part:

> "In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be furthered."

It is noted in the majority opinion that this statute has not been previously construed. They add that "It is apparent, however, that the granting or withholding of permission to intervene is within the sound discretion of the trial court."

So that the key question obviously is: Does a contempt proceeding constitute a civil action or proceeding under R. C. 733.581? The case authorities answer negatively.

While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not criminal prosecutions within the Sixth Amendment to the United States Constitution, or common understanding.

A contempt proceeding is *sui generis*. Blackmer v. United States (1932), 284 U.S. 421; Blankenburg v. Commonwealth (1930), 272 Mass. 25, 172 N.E. 209.

Contempt proceedings are *sui generis*, being neither "civil actions" nor "criminal prosecutions" within ordinary meaning of terms. Bowles v. United States (C. A. Md. 1931), 50 F.2d 848, 850.

Sui generis, translated, means: Of its own kind; peculiar to itself.

Ohio lines up with the United States Supreme Court in holding that a contempt proceeding is a special proceeding. Iron Moulders Union v. I. & E. Greenwald Co. (1906), 4 N. P. (N. S.), 161, 1964.

A contempt proceeding is not a civil action but a special statutory proceeding. See Niemes v. Niemes (1917), 97 Ohio St. 145.

There is a catholicity of authority on the same point from many jurisdictions.

The majority agree that such proceedings are sui generis. It then follows inescapably that the trial court had no authority under R. C. 733.581 to grant the application to intervene because the contempt proceeding was not a civil action or proceeding and the trial court abused its discretion in granting such motion to intervene.

Accordingly, for this reason alone, the judgment of the Court of Appeals should be reversed.

CELEBREZZE, Justice, concurs in the foregoing dissenting opinion.

WILLIAM B. BROWN, Justice, dissenting:—I dissent from the judgment and from the last two paragraphs of the syllabus.

The court abused its discretion in levying against local Council 51 and the parent union fines totalling $37,000 ($1,000 for each of 37 days).

For the violation of an injunction which amounts to contempt, the violators can be fined pursuant to R. C. 2705.05 or R. C. 2727.12, or both. Hayes v. Hayes (1919), 11 Ohio App. 10. R. C. 2705 provides:

> "Upon the day fixed for the trial in a contempt proceeding the court shall investigate the charge, and hear

any answer or testimony which the accused makes or offers.

"The court shall then determine whether the accused is guilty of the contempt charge. If it is found that he is guilty, he may be fined not more than five hundred dollars or imprisoned not more than ten days, or both."

Since there are two defendants who admitted to violating the injunction, fines totalling $1,000 could have been levied. R. C. 2727.12, as will be shown hereinafter, does not apply. So the levy of $37,000 constituted an abuse of discretion.

The majority attempts to justify the fines on four alternate grounds: (1) that each day the strikers were out of work constituted a separate violation of the court order; (2) that the power of the court to impose punishment for contempt cannot be limited by the General Assembly; (3) that civil as well as criminal contempt is involved; and (4) that R. C. 2727.12, allowing restitution for the violation of an injunction, applies here.

As to the 37 violations, the injunction granted January 6, 1970, enjoined the defendants "from carrying on a strike and/or picketing against the city of Cincinnati, Ohio." When the workers did not go to work the following day, they violated the injunction because they were "carrying on a strike." They remained in violation of the injunction until they returned to work. So, there was a violation by the local union and the parent union; and, according to R. C. 2705.05, they were subject to a total of $1,000 in fines. The majority assumes that there was a separate violation of the injunction for each day the workers were not at work. Why not compute a violation for each hour the workers were not working? How is one day decided upon as the period for which a new violation is computed? There is no indication in the statute nor in the Ohio case law to support this novel interpretation.

Secondly, the majority doubts that contempt power can be limited by the General Assembly. As regards direct contempt, the court's power cannot be limited. State v. Local Union 5760 (1961), 172 Ohio St. 75, 82, 47 LRRM 2921. In the instant case, however, there is indirect contempt.

Indirect contempt involves actions committed outside the presence of the court, tending to obstruct the due and orderly administration of justice. In the Matter of Lands (1946), 146 Ohio St. 589, 595. The activity in the instant case did not occur in the presence of the court; nor did it fall within the exceptions of Hale v. State (1896), 55 Ohio St. 210, where a witness under subpoena to testify was removed outside of the court's process, or of State v. Local Union 5760 (1961), 172 Ohio St. 75, 47 LRRM 2926, where a sheriff was prevented from serving a writ of replevin. Indirect contempt is involved here, so the statutory provisions for levying fines must be followed.

The invocation of the court's summary power for direct contempt is an awesome power that the court must be cautious in using: it should be restricted to activity that threatens the integrity or the very functioning of the judicial process. The illegal activity here admittedly was contemptuous; but it was not of a nature that would justify the court's use of its summary and arbitrary power. I see no reason to extend that power to our situation.

Thirdly, civil contempt is that judicial power used to bring about compliance with lawful court orders. Paragraph three of the syllabus in Windham Bank v. Tomaszczyk (1971), 27 Ohio St.2d 55, provides:

> "The purpose of sanction in a case of civil contempt is to compel the contemnor to comply with lawful orders of a court * * *."

The trial in the instant case was held at a time long after the strike was settled. There was no possibility of com-

pelling the contemnor to comply, so there could be no civil contempt. Criminal contempt alone is involved here.

Both Windham Bank v. Tomaszczyk supra, and United States v. United Mine Workers of America (1947), 330 U.S. 258, 19 LRRM 2346, are cited as support for the dual, criminal and civil, aspects of this case. Those two cases are readily distinguishable. In those cases, the contemptuous activity continued until the date of trial, and the court could have imposed the sanctions of civil contempt to effect compliance; in the instant case the strike was settled, and there was no purpose for using civil contempt.

Lastly, it is claimed that the fines could be justified under R. C. 2727.12, which provides:

> "Upon being satisfied, by affidavit, of the breach of an injunction or restraining order, the court or judge who issued such injunction or order may issue an attachment against the guilty party who shall pay a fine of not more than two hundred dollars, for the use of the county, *make immediate restitution to the party injured,* and give further security to obey the injunction or restraining order. In default thereof, said party may be committed to close custody until he complies with such requirement, or is otherwise discharged." (Emphasis added).

The Restatement of the Law, Restitution, provides, at page 12:

> "Section 1.
>
> "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

The connection of restitution and unjust enrichment is explained later in the restatement at pages 595-96, as:

> "Actions for restitution have for their primary purpose taking from the defendant and restoring to the

plaintiff something to which the plaintiff is entitled, or if this is not done, causing the defendant to pay the plaintiff an amount which will restore the plaintiff to the position in which he was before the defendant received the benefit."

In this case, the unions have not received a windfall: they have not been enriched at all; in fact they are poorer, as a result of the strike.

Therefore, the amount levied in fines should have been limited to a total of $1,000.

THE SUPREME COURT OF THE STATE OF OHIO

1973 TERM

To wit: July 18, 1973

No. 72-697

THE STATE OF OHIO, CITY OF COLUMBUS.
CITY OF CINCINNATI, *Appellee,*

vs.

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Appellants*; ET AL., *Appellee.*

Mandate

To the Honorable Common Pleas Court within and for the County of Hamilton, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed in all respects except that it is reversed with respect to the finding that appellants were in contempt of the permanent

injunction on January 4 and January 5, 1970, for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN,
Clerk

RECORD OF COSTS

Docket Fee, $20.00; Paid by James C. Paradise

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

1973 TERM

To wit: September 6, 1973

No. 72-697

THE STATE OF OHIO, CITY OF COLUMBUS.
CITY OF CINCINNATI, *Appellee,*

vs.

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Appellants*; ET AL., *Appellee.*

Rehearing

It is ordered by the court that rehearing in this case is denied.

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. 11864

July 10, 1973

CITY OF CINCINNATI, *Plaintiff-Appellee,*

vs.

CINCINNATI DISTRICT COUNCIL NO. 51, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Defendants-Appellants.*

Decision

Per Curiam.

This cause came on to be heard upon the appeal, the transcript of the docket and journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the assignments of error, the briefs and arguments of counsel for the defendants-appellants and counsel for the intervenor-appellee.

Upon consideration thereof, the Court finds that the first assignment, in both its branches, is not well taken. Uncontrovertedly, an illegal strike by public employees had been enjoined by the court below. By stipulation set forth in the record, District Council 51 and the affiliated local unions maintained a strike fund and the International Union contributed funds thereto. It is clear that such financial support encouraged, aided and abetted the illegal actions of the strikers and made it possible for them to prolong the strike. Deeds and words of agents and officers of the labor organizations similarly constituted approbation of the contumacious acts manifest from the record. The strike was enjoined from its beginning to the date

upon which the strikers resumed work for the City of Cincinnati, and a court has the power to impose repeated penalties for multiple contempts evidenced by failure to obey its order over a period of time.

Therefore, the court did not err in finding that each day constituted a contempt of an order of court, that there were thirty-seven separate violations, that is, contempts, such finding being fully supported by the record and, in the premises, did not err prejudicially in denying motions of appellants for specifications. There was no denial of due process of law manifest from the record either in the findings or the assessment of the fine.

Further, the Court finds that the second assignment of error is not well taken. From the record, it is clear that the fines imposed by the court do not exceed the maximums established either by Section 2705.05 or Section 2727.12, Ohio Revised Code, since the contemnors were penalized separately for separate but continuing acts of contempt.

Further, the Court finds that the third assignment of error is not well taken. The intervenor-appellee adduced substantial evidence of probative value to establish pecuniary damage to the City of Cincinnati proximately caused by the illegal strike and contumacious acts of defendants-appellants. The proceedings below related to civil contempts and the court was empowered, in the totality of circumstances, to award damages, that is, to compensate the entity which was injured by the violation of the order of court, since a court's power in civil contempt proceedings is to be determined by the requirements of full remedial relief. In the case at bar, the award is in harmony with the manifest weight of the evidence.

Further, the Court finds that the fourth assignment of error is not well taken. The court did not err in permitting the intervenor to initiate and pursue contempt proceedings and seek damages for the City of Cincinnati. By

statute, (Section 733.581 Ohio Revised Code), it is provided:

> "In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be furthered."

In this connection, we are constrained to note that the solicitor of the City of Cincinnati failed to appear upon call of this matter before this Court to argue on behalf of the City. The brief filed by the solicitor refers to a "memorandum of settlement" entered into between the labor organizations and the City immediately prior to the return to work of the strikers. It is the stated position of the solicitor that pursuant to such "settlement" be entered into a joint motion with defendants-appellants seeking a modification of the order on "the contempt matters" and for a dismissal of the entire matter including dissolution of the injunction. No where in such brief does the solicitor respond to the assignments of error and this Court considers such brief to be frivolous.

It is difficult to conceive of a matter of more importance to the public than a strike by employees of a city and the cessation of vital services thereby occasioned. The City, through its solicitor, sought and obtained court orders enjoining the strike here involved. The City thereafter brought and supported charges of contempt of such orders. In Windham Bank v. Tomaszczyk, 27 Ohio St. 2d 55, the Supreme Court has stated (syllabus two):

> "The purpose of contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice."

It is manifest to us that permitting the intervenor to act was to protect the public interest and to further justice.

Further, the fifth assignment of error is not well taken because it is not supported by the record. Additionally, acts which are contumacious cannot be expiated by agreements or arrangements between the parties or their attorneys. They cannot, themselves, excuse disobedience of a court order.

Further, the sixth assignment of error is not well taken because the finding of the court is not contrary to the manifest weight of the evidence and for reasons stated hereinabove.

Further, the seventh assignment of error is not well taken because the finding of the court that the International Union was in contempt on each day that the strike continued is supported by substantial and probative evidence.

Further, the eighth assignment of error is not well taken because the findings concerning damages are supported by substantial and probative evidence and for the reasons given in our ruling upon the third assignment of error.

Further, the ninth assignment of error is not well taken for the reasons given in our ruling upon the first and fourth assignments of error as they apply to defendants-appellants' contention that the court erred in refusing to dismiss the action and to dissolve the injunction.

Therefore, the judgments and orders of the Court of Common Pleas of Hamilton County, Ohio, are affirmed.
Hess, P. J., Young and Shannon, J. J.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. 11864

Judgment Entry

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellants, by his counsel, excepts. Entered

July 10, 1972
MINUTE 348

APPENDIX D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-244947

CITY OF CINCINNATI, *Plaintiff*,

vs.

CINCINNATI DISTRICT COUNCIL No. 51, AMERICAN FEDERATION ETC. ET AL., *Defendants*.

Decision of the Court

Morrissey, J.
July 28, 1971

The Court: Counsel, in regard to the supplemental motion on grounds for reopening the case, it's hereby denied.

In regard to the contemptuous behavior of the striking organizations, evidence having been produced at prior date indicating the strike to be 37 days, the Court hereby levies a fine of $1,000 for each day of the strike equal to the sum of $37,000.

Mr. Paradise: I'm sorry, your Honor, I don't quite understand. I didn't hear exactly what you ruled. $37,000 against whom?

The Court: Against the union organizations, not the individuals.

Mr. Paradise: Total?

The Court: Yes, as a whole.

Mr. Paradise: Is that distributed among each of them?

The Court: Pro rata.

Mr. Paradise: Pro rata?

The Court: On a share basis as they agreed.

Mr. Goldman: Your Honor, are you disposing of the civil contempt proceedings on the preceding hearing as to the damages suffered by the City as a result of the strike?

The Court: In that regard on the motion, Mr. Goldman, Mr. Paradise, Mr. Kircher, the Court is going to take into consideration the $7,800 bond, and it will be forfeited and credited against the $37,000. The $2,400 in fines that had previously been paid by the individuals will be credited against the $37,000, and the court costs that are due and owing in this case, approximately but not in excess of $1,000, will be credited against the $37,000. Now, if possible, the balance in round figures, about $25,800, if possible, will be split between the City of Cincinnati and the County of Hamilton, to be the sum equal to the amount applicable to the City as damages, and the balance to be applicable to the County by way of fines.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-244947

Judgment Entry

This matter is before the Court following trial on an order to show cause why the defendants and certain additional persons and organizations should not be held in contempt of this Court's order of permanent injunction entered in this case on January 6, 1970.

The principal action was originally brought by the City of Cincinnati against the defendant unions who had threatened a strike against the City and their officers and agents. A temporary restraining order was issued by another Judge of this Court on the 4th day of January, 1970. It was completely ignored and flagrantly violated by the defendant unions and their principal officers and agents. Apparently no effort was made to require those guilty of such violations to answer for their contempt of that temporary order.

Thereupon the case was tried on the merits and at the conclusion of such trial on the 6th day of January, 1970,

this Court entered its judgment and permanent injunction enjoining and restraining defendants from carrying on a strike or picketing against the City of Cincinnati.

The ink was hardly dry on this Court's permanent injunction when a number of the defendants with full knowledge of it proceeded to violate it. The strike continued unabated. Certain of the defendants were brought before this Court for their contempt, and as punishment fines and jail sentences were imposed. Some of the jail sentences were suspended; others were partially served and those serving jail terms were permitted to leave their confinement before they had fully served their sentences at the request of the City in the hope that they would help bring the strike to a speedy close. However, the strike went on and the defendant unions and certain of the other defendants continued to violate this Court's injunction by continuing, encouraging, aiding and abetting the strike.

With full knowledge of this Court's permanent injunction the International Union, a parent of the defendant unions, American Federation of State, County and Municipal Employees, AFL-CIO, in Washington, D.C. sent at least two of its representatives, Jesse Epps and Robert Brindza to Cincinnati to assist the defendant local unions and the defendant Cincinnati District Council No. 51 in carrying on the strike, and contributed twenty thousand dollars ($20,000.00) to District Council No. 51 as financial support for the strike. The defendant local unions and Cincinnati District Council No. 51 also contributed varying amounts to give financial support for the strike.

The strike continued and this Court's injunction continued to be repeatedly violated until the 9th day of February, 1970, although the date on which the City and the unions entered into an agreement to settle the strike was the 7th day of February 1970. The fact that pressure was brought to bear on the City by the illegality of the strike and violation of this Court's order was ignored by the

City, and the City asked to have the earlier contempt proceedings herein dismissed and previous punishment imposed remitted.

In the meantime, however, a taxpayer, citizen and resident of the City, filed an application to intervene herein under the provisions of section 733.581 of the Revised Code on the ground that this matter involved the public interest and that such intervention would better serve the public interest and further justice. This Court believing that the public interest was very much involved in this case, and that it would be better served and justice furthered by such intervention, granted such application to intervene. The Court refused to dismiss the earlier contempt proceedings, or at that time to remit the penalties imposed.

Upon the motion of the intervenor, this Court issued an order to show cause on the defendants and on the parent union in Washington, D.C., and on its representatives, Epps and Brindza, why they should not be held in contempt of this Court's order of injunction and why they should not respond in damages to the City for damages caused the City by their violations of this Court's order. Such order was duly served on the defendants and on said parent union and said Epps and Brindza, and they all were given adequate time to answer and prepare for trial.

Upon the trial it was amply demonstrated that the defendant local unions, Cincinnati District Council No. 51, and the parent union as well as its representatives, and many of the individual defendants were all guilty of repeated contempts of this Court's injunction.

However, at the suggestion of counsel for the intervenor, this Court in the exercise of its prerogative to show mercy even when mercy may be undeserved, dismissed the charges against the individual union members. This Court did not dismiss the charges against the local unions, Cincinnati District Council No. 51 and the parent union, and Messrs.

Epps, Brindza, Van Hagen, Powell and Inman. The Court, however, wishes to emphasize to the individual union officials and representatives who violated its injunction, that any further or similar violation will not be tolerated, and that mercy will not be in order if there is a repetition of similar contumacy.

The individuals, Epps, Brindza, Van Hagen, Powell and Inman, because of their contumacious conduct, in some cases quite aggravated, really deserve no mercy. Nevertheless the Court will show them mercy and hereby remits the balance of the unserved time of the earlier jail sentences imposed on any of Van Hagen, Powell and Inman, and also the suspended jail sentences imposed earlier on James Switzer, Thomas Rothert, Gerald Ellison, Clifford R. Sharp, Ivan Calhoun, Robert Buck and William Bruger. Fines previously assessed against any defendants and not paid are hereby remitted and are not ordered to be paid.

The Court finds each of the defendant local unions guilty of contempt of this Court because of their repeated violations of this Court's injunction, but because of the action taken herein against Cincinnati District Council No. 51 and the parent union in Washington, D.C., and in the hope that the local unions will in the future not be misled into violating the law and court orders, no penalties are assessed against such local unions.

As to the defendant Cincinnati District Council No. 51, American Federation of State, County and Municipal Employees, AFL-CIO, and the parent union American Federation of State, County and Municipal Employees, AFL-CIO Washington, D.C., the Court finds each of them guilty of repeated separate contempts of this Court by their own direct violations and aiding and abetting and supporting others to violate this Court's injunction each day from the 4th day of January, 1970, to the 9th day of February, 1970, inclusive, and as punishment therefor this Court hereby assesses a fine plus damages for a total of $1,000.00 per

day for each day said strike continued from the 4th day of January, 1970, to the 9th day of February, 1970, inclusive, being 37 days, each day being deemed a separate contempt for said District Council and for said International Union.

The Clerk of this Court is holding as security $7800.00 in cash from funds otherwise payable to said Cincinnati District Council No. 51. Said Clerk is hereby ordered to pay said sum of $7800.00 into the appropriate account for collected fines.

Coming now to consider the question of damages the Court finds that the City suffered very substantial damages because of the charged defendants' and others' continuancy. In some instances because of the difficulty of fixing a dollar amount for damages suffered from failure to collect garbage and other waste, causing streets to remain in disrepair, failure to treat sewage, and other instances of grave damage, no dollar amount was established with requisite certainty. It was shown that the damages for loss of services suffered by the City was at least $480,000.00 in actual dollar amount; that the Water Works was put to extra expenses in excess of $60,000.00; that the City motor vehicle inspection lane lost revenue as did City parking meters. Were the Court to assess damages in an amount that would even approach the damages actually proved with requisite certainty, not to speak of the much larger damages the amount of which was too difficult to prove with requisite certainty, it might very well bankrupt the individuals and labor organizations involved. This the Court wishes to avoid doing because the individuals may have "learned their lesson," and because those organizations, if they conducted themselves within the law, could perform valuable services to their members and to the community.

It Is Hereby Ordered that judgment be entered on said verdict in favor of plaintiff, City of Cincinnati for damages suffered by the City, and enters said judgment in its favor

against said parent union, American Federation of State, County and Municipal Employees, AFL-CIO, Washington, D.C., and the Cincinnati District Council No. 51, of the American Federation of State, County and Municipal Employees, AFL-CIO, jointly and severally, in the sum of $13,000.00.

Counsel for the intervenor taxpayer having requested that no award of attorneys' fees be made to him, his request will be respected and no award of attorneys' fees will be made.

Costs of these proceedings at defendants' costs.

RECAPITULATION:

Strike 37 days at $1,000.00 a day		$37,000.00
Credit:		
Security bond	$7,800.00	
Fines pre-paid	2,400.00	
Court costs (approx.)	1,000.00	
Total	$11,200.00	
		11,200.00
Approximate amount due		$25,800.00
Damages payable to City of Cincinnati		13,000.00
Criminal Penalty payable to County of Hamilton, Balance		$12,800.00

William J. Morrissey, Judge

APPENDIX E

Order To Show Cause

(Filed August 25, 1970)

This cause coming on to be heard upon the motion of Mitchell B. Goldberg, taxpayer, intervenor herein, and it appearing that question has arisen whether adequate notice was given on an order to show cause previously issued by the Court, the Court hereby resets the date of hearing and reissues its order to show cause with a new hearing date. The Court hereby orders that the defendants Cincinnati District Council No. 51, American Federation of State, County and Municipal Employees, AFL-CIO; Aloysius Van Hagen, Staff Director, Cincinnati District Council No. 51; Nolan Tate, Jr., Staff Representative, Cincinnati District Council No. 5; James Levendusky, Staff Representative, Cincinnati District Council No. 51; Ethelrie Harper, Staff Representative, Cincinnati District Council No. 51; Stanley Harmon, President, Cincinnati District Council No. 51; James Powell, Vice President, Cincinnati District Council No. 51; Betty Colvard, Secretary, Cincinnati District Council No. 51; James E. Cooke, Treasurer, Cincinnati District Council No. 51; Municipal Garage & Inspection Lane, Local 190 of the Cincinnati District Council No. 51; Stanley Harmon, President, Local 190; James Lucas, Vice-President, Local 190; Jesse F. Wynn, Secretary, Local 190; James E. Cooke, Treasurer, Local 190; Foreman, Supervisors & Inspectors, Local 223 of the Cincinnati District Council No. 51; Earl W. Schroder, President, Local 223; Clifford R. Sharp, Vice-President, Local 223; Charles Heavering, Secretary, Local 223; Guy Smallwood, Treasurer, Local 223; Municipal Employees Local 240 of the Cincinnati District Council No. 51; Ronald Reliford, President, Local 240; Paul H. Kraft, Vice-President, Local 240; George Hanlein, Secretary, Local 240; Oliver Baker, Treasurer, Local 240; Public Employees Local 250 of the Cincinnati District Council No. 51; Charles Rice, President,

Local 250; George Riggs, Vice-President, Local 250; Gennie M. Ford, Secretary, Local 250; Solomon Marble, Treasurer, Local 250; Workhouse Employees Local 898 of the Cincinnati District Council No. 51; Smith Holbrook, President, Local 898; John Douglas, Vice-President, Local 898; John Krailler, Secretary, Local 898; Daniel Littleton, Treasurer, Local 898; Clerical, Professional & Technical, Local 1543 of The Cincinnati District Council No. 51; Hazel Grimmer, President, Local 1543; Betty Colvard, Vice-President, Local 1543; Mary E. Jones, Secretary, Local 1543; Lucille Reed, Treasurer, Local 1543; International Union of Operating Engineers Local 20; Stanley Inman, Business Representative, Local 20; also on Jesse Epps, International Representative of the American Federation of State, County and Municipal Employees, AFL-CIO; Robert Brindza, International Representative of the American Federation of State, County and Municipal Employees, AFL-CIO; and American Federation of State, County and Municipal Employees, AFL-CIO appear before this Court on the 21st day of September, 1970, at 9:30 o'clock A.M. to show cause why they should not be held in contempt of this Court for violating this Court's permanent injunction heretofore entered in this case, and upon hearing if this Court shall find that any of said defendants did violate this Court's injunction, to show cause why this Court should not punish such defendants if any, as the Court may find violated said injunction and why such defendants should not pay damages to the plaintiff for sivil (sic) contempt in such amount, if any, as the Court may find such violation has damaged plaintiff.

The Clerk shall cause a copy of this order to be served by certified mail on each of the persons or other entities named herein and ordered to show cause, in the same manner process is authorized by Rules 4.1(1), 4.2 and 4.3 of the Ohio Rules of Civil Procedure.

/s/ MORRISSEY, *Judge*

APPENDIX F

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.